84-1451

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BENNETT EDWARD BAKER,
Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,
(Formerly Known as Louisville and Nashville Railroad Company),
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a close factual situation, when other federal circuits have deferred the question to the jury for resolution, summary judgment on the issue of scope of employment under the Federal Employer's Liability Act is an approximate procedural remedy?

2. Did the grant of summary judgment on a crucial element of the Federal Employer's Liability Act, without due consideration of the extraordinary facts in this case, serve to deny the petitioner his statutory right of redress for accidental injuries arising under the Act?

3. Whether petitioner's evidence that he was taking reaction-inhibiting drugs pursuant to his employer's physician's instructions following an on-duty injury eleven days earlier, that the doctor's diagnosis and instructions were conveyed to the railroad on its own stationary, that the railroad's doctor failed to warn the petitioner against driving while under the influence of such medication, that petitioner was advised to report to work and do nothing so the railroad would get credit for his attendance under a remunerative safety contest program underway, and that reporting for duty while taking such medication was in violation of the railroad's own work rules, all serve to raise a factual question as to whether the petitioner's subsequent off-premises injury was a foreseeable consequence of such events and thus precludes summary judgment on the issue of scope of employment under the Federal Employer's Liability Act?

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BENNETT EDWARD BAKER,
Petitioner,

VS.

SEABOARD SYSTEM RAILROAD, INC.,
(Formerly Known as Louisville and Nashville Railroad Company),
*Respondent.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William W. Schooley, Attorney at Law, on behalf of Bennett Edward Baker, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. D, infra, pp. A-5 -A-9) is not reported. The opinion of the district court (App. A, infra, pp. A-1 - A-3) is not reported.

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* There are no other parties to this case.

JURISDICTION

The judgment of the court of appeals (App. D, pp. A-5 - A-9) was entered on December 13, 1984. The jurisdiction of this Court is invoked under the Federal Employer's Liability Act, 45 U.S.C. §§51, 56.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **Section 51 of the Federal Employer's Liability Act,** codified at 45 U.S.C., provides that:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as be-

ing employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

2. **Rule 56 of the Federal Rules of Civil Procedure,** codified at 28 U.S.C., provides, in pertinent part, that:

> (b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT

This case concerns the status of a railroad employee who brings an action under the Federal Employer's Liability Act for personal injuries received while off-duty which can be directly traced to the consequences of a recent on-duty injury. Petitioner, Bennett Edward Baker, was injured on October 20, 1980 while working for the Louisville and Nashville Railroad Company, now known as Seaboard System Railroad, Inc. He was prescribed reaction-inhibiting medication by the company doctor and advised to rest and return in one week. The railroad, at the time, was involved in a safety contest wherein certain divisions would receive cash prizes for the least-lost time accidents, which money could be used for employee celebrations of their

choice. The Petitioner was thus advised to report for duty and then allowed to return home. The first week after his accident he reported to a work site two miles from his home. Beginning with the second week, he was told to report to a location some thirty miles away. While en route to this more remote work site eleven days after the initial injury, he was involved in a one car accident rendering him paraplegic. The railroad moved for summary judgment on the grounds that the employee was not performing work for the railroad at the time of the second accident and was thus not acting within the scope of his employment under the Federal Employer's Liability Act. The district court granted the motion, but cautioned the defendant that generally questions regarding the scope of employment are questions of fact and should not be addressed in a motion for summary judgment. The Court of Appeals for the Sixth Circuit affirmed, citing the general rule that an employee who selects his own means of transportation is not within the coverage of the Federal Employer's Liability Act in traveling to and from work.

Petitioner contends that the extraordinary facts in this case take it out of the general rule, and at the very least, raise some material facts about which there is a genuine doubt so as to preclude the granting of summary judgment on this crucial element of the Federal Employer's Liability Act. Evidence submitted by the Petitioner in opposition to the motion for summary judgment included portions of the depositions of the Petitioner, his wife, and his supervisor at the railroad; affidavits of a pharmacologist and an eyewitness to the second accident; as well as exhibits consisting of the railroad doctor's report, the railroad's safety contest bulletin, and the railroad's safety rules. All of these, except for the depositions, are included in the appendix, *infra.*

Petitioner's evidence consisted of the following salient facts:

1. Following his on-duty injury of October 20, 1980, Petitioner was taken to a physician designated by the railroad.

2. The physician, Dr. Acuff, presently deceased, diagnosed his condition as lumbar strain and prescribed Soma Compound, 350mg. and Tylenol #4, to be taken every four hours. The Petitioner was further told to use heat and rest and return in one week.

3. The company doctor reported his findings, diagnosis and treatment to the Louisville and Nashville Railroad on a prescribed form with their letterhead, which was dated October 20, 1980. (Appendix G, infra, pp. A-16 - A-18)

4. Leonard L. Neager, a pharmacologist, stated the effects of these medications individually as being capable of producing central nervous system depression, including drowsiness, dizziness, vertigo and ataxia. He further stated that the symptoms of each medication may be increased in combination with the other. (Appendix E, infra, p. A-10)

5. The company doctor did not warn Petitioner that the medications were capable of producing these side-effects or advise him not to operate an automobile while under their influence.

6. The safety rules of the Louisville and Nashville Railroad in effect at the time prohibited the use of any medication or drugs capable of producing drowsiness or reducing mental alertness within the eight hour period before reporting for duty. (Appendix H, Rule N, infra, p. A-20)

7. The Petitioner took the medication regularly, because of pain in his back, which caused him to become relaxed and drowsy.

8. Petitioner's wife stated that ever since he began taking the medication he slept a lot and was not himself.

9. Petitioner took both medications, pursuant to the doctor's instructions, on the morning of October 30, 1980 approximately a half hour before he left for work.

10. Petitioner had been reporting for work ever since his initial injury on October 20, 1980. He performed no work activities but merely sat around as he was not physically able to work.

11. Petitioner's supervisor, the railroad road master, told him where to report for work.

12. The four work days immediately following the injury of October 20, 1980, the Petitioner reported to an unattended truck repair shed about two miles from his home, by way of some country roads, where he reported in by telephone and then returned home.

13. The next five work days, the Petitioner reported to a railroad yard in Knoxville, approximately thirty miles away by way of a four lane highway, which was heavily traveled during the morning rush hour. Petitioner did nothing at the Knoxville yard but sit around, returning home in early afternoon.

14. The railroad was presently engaged in a safety contest with other divisions known as Operation "Score". A monetary prize would be awarded to the division with the least lost-time accidents during a specified period of time. (Appendix F, infra, pp. A-11 - A-15)

15. The morning of October 31, 1980, while driving to the Knoxville yard, Petitioner was involved in a one car accident on the highway.

16. An eyewitness to the accident stated that Petitioner did not react to a vehicle directly in front of him that was slowing down to turn, with its directional signal on. Rather, Petitioner continued on without braking or slowing and at the last moment, swerved to the right and went over a steep embankment on the side of the highway. The eyewitness stated that Petitioner had time and space to move into the opposite lane and that Petitioner's reaction was unusual. The eyewitness observed Petitioner immediately thereafter and noticed that Petitioner appeared to be "real spacey" and that his eyes were dilated.

Respondent's evidence consisted of the following factual assertions:

1. Petitioner was driving his own automobile from his home en route to work.

2. The railroad did not tell Petitioner how to get to work.

3. Petitioner was not paid for his time nor his expenses while traveling.

4. Petitioner was not performing any work for the railroad while driving to work.

The basis for Federal Jurisdiction in this case was Section 56 of the Federal Employer's Liability Act which provides that an action may be brought in a District Court of the United States where the defendant resides or does business or where the cause of action arose. 45 U.S.C. §56.

REASONS FOR GRANTING THE PETITION

The decisions below encroach upon the rights of employees under the Federal Employer's Liability Act by limiting the effectiveness of the Statute and frustrating its remedial purpose. The decisions are in conflict with applicable decisions of this Court as well as other Courts of Appeal in construing the Statute.

The Court has repeatedly emphasized that the questions of scope of employment and independent contractor versus employee are factual issues for the jury to decide, not the judge. In ruling on these issues as a matter of law, especially in a close factual situation as presented here, the courts below have substituted their judgment for that of the jury, and denied the Petitioner his statutory right of redress for injuries arising from the alleged negligence of the railroad. Moreover, the failure of the Court of Appeals to even address the unique and extraordinary factual circumstances asserted by Petitioner to preclude the granting of summary judgment show such a departure from the accepted and usual course of judicial proceedings regarding the sparing use of this drastic remedy as to warrant review by this Court.

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment is only appropriate if all the pleadings and other evidence of record show that there is no genuine issue as to any material fact. It is an extreme remedy and is not to be entered unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances. *Keys v. Lutheran Family and Children's Services of Mo.*, 668 F.2d 356 (8th Cir. 1981). Even if the moving party has technically satisfied the criterion in Rule 56, the trial court is not obligated to grant the motion but may nevertheless decline it in the exercise of its discretion. *Williams v. Howard Johnson's, Inc. of Wash.*, 323 F.2d 102.

The departure of the courts below from these accepted and usual standards is made all the more apparent when you con-

sider that the Petitioner's unique factual circumstances are not even addressed in the opinion of the Court of Appeals. The court's opinion merely recites the general rule that commuting to an assigned worksite in a private automobile is outside the coverage of the Federal Employer's Liability Act when the railroad has not specified that mode of travel.

The court does not even address the foreseeability of subsequent injury to the Petitioner as a result of the railroad's alleged negligence on October 20, 1980. It completely ignores the facts that Petitioner would not have been taking reaction-inhibiting drugs but for the covered accident on October 20; that the railroad's physician failed to warn the Petitioner of the drug's possible side-effects and caution against driving; that Petitioner would not have been driving to work in a drug-induced state but for the safety contest underway and the railroad's desire to have a clean safety record with no lost time attributed to Petitioner's division; and that the Petitioner would not have been driving to work in a drug-induced state on a major highway on the day in question if his worksite had not been changed.

The court's opinion makes no mention of the safety contest underway, or whether petitioner's traveling to work was a benefit to his employer. Why else would the railroad have a man come in and do nothing, keeping him on the payroll, if it did not stand to benefit in some way?

The decisions below also fail to address the question of whether the doctor's negligence could be imputed to the railroad as an agent or servant of the employer. In those cases finding a causal relationship, the alleged negligence of the doctor does not take place on the employer's premises, but it is seen as a foreseeable consequence of the initial negligent act. *O'Donnell v. Pennsylvania R. Co.*, 122 F.Supp. 899 (N.Y. 1954). The question of whether or not a physician is acting as an employee for the railroad if and when he has committed a negligent act has been viewed as a material fact in establishing negligent con-

duct on the part of the railroad. *Dunn v. Conemaugh & Black Lick Railroad,* 163 F.Supp. 324 (Pa. 1958).

There are no hard and fast rules for determining when an employee is acting within the scope of his employment under the Federal Employer's Liability Act. If the cases show anything, it is that the courts must defer to the particular facts and circumstances of the case before it in making the determination. This is in keeping with the benevolent purpose of the Statute.

The Act is addressed to providing a remedy to "railroad employees injured as a result of the hazards incident to their work...". *Metropolitan Coal Company, et al. v. Johnson,* 265 F.2d 173 (1st Cir. 1959).

The exposure to hazards to which the general public is subjected are not within the contemplation of the Act. The Petitioner here cannot be said to be in the same category as a member of the general public. He was subjected to hazards to which the general public was not. His physical and mental condition, his presence in his automobile, on the road in question, at the time in question, can all be directly related to the hazards of his employment and arguably, to the negligence of his employer.

Physical fatigue from overwork resulting in an off-premises injury has been held to be within the intended scope of the Statute. *Panichella v. Warner Brothers and Pennsylvania Railroad Company,* 167 F.Supp. 345 (W.D. Pa. 1958). Does not mental fatigue from medication taken to combat the effects of a work-related injury make a similarly submissible case on foreseeability? Petitioner was not actually performing any work for the railroad while traveling to the Knoxville yard on October 31, 1980. But neither was he performing any work once he got there. He was, nevertheless, performing a service to his employer by going to work that day in view of the pending safety contest.

The *Panichella* case conflicts with the narrow holding of the courts below and more correctly states the standard of review of motions to absolve the railroad of liability. In *Panichella,* the plaintiff sustained injuries when he fell on a snow-covered sidewalk off the employer's premises while getting lunch for himself and his foreman. He introduced evidence to establish that his physical condition was such as would permit a jury to infer that he was overtired from his continuous labors, and that the railroad was negligent in knowingly instructing and permitting him to enter an area that might prove hazardous because of the prevailing weather conditions, and plaintiff's own lack of alertness dulled by overwork. Verdict for the plaintiff was sustained, and the railroad's motion for judgment n.o.v. denied, with the court stating that:

> "...the underlying precept of statutory liability under the Federal Employers' Liability Act is predicated upon the railroad's duty to provide the plaintiff a safe place to work. To expose an employee in a fatigued and exhausted condition to unreasonable peril is negligence whether on the railroad's property or not so long as the employee's presence upon the premises where he receives his injuries must have been a necessary incident in the discharge of the duties of his employment. 167 F.Supp. 345 at 351.

The court further stated that:

> "If there is a reasonable basis for concluding that negligence of the employer was the cause of plaintiff's injury, it would be an invasion of the jury's function for the court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. 345 F.Supp. 345 at 350.

The cases relied upon by the Court of Appeals fail to make these distinctions. They raise no special circumstances. They merely stand for the general rule that employees commuting to work are ordinarily not deemed to be within the course of their

employment. The key word is *"ordinarily."* Even *A. G. Spoonamore v. Louisville & Nashville Railroad Co.,* 179 F.Supp. 290 (E.D.Ky. 1959), stated by the court to be most factually similar to the present case, leaves open the door for an exception to that general rule. In *Spoonamoore,* the plaintiff was employed as an engineer for the railroad. The plaintiff and two other employees were traveling 150 miles from their home in Lexington, Kentucky to Hazard, Kentucky to report for duty on a new job. They traveled by private automobile and while enroute to Hazard were involved in an accident. The trial court properly held that the plaintiff was not in the course of his employment. No special circumstances were alleged to indicate that the plaintiff was subjected to hazards any different from those of the general public.

When stating the general rule that accidents occuring while commuting to work are ordinarily not deemed to be within the course of employment, virtually all of the cases qualify this by stating that "the situation may change if getting to work requires the employee to face unique hazards," and that "each case must be decided on its own peculiar facts and ordinarily no one feature of the relationship is determinative." *Getty v. Boston and Maine Corp.,* 505 F.2d 1226 (1st Cir. 1974).

The foreseeability of further injury or aggravation of one's condition is one of the "peculiar facts" to be considered by the court. Assignment of an employee by the railroad to a task which it knew or should have known the employee was unfit to perform may take the case out of the general rules. Such a situation existed in *Waller v. Southern Pacific Company,* 57 Cal. Rptr. 353, 424 P.2d 937 (1967). In the present case, the railroad, through its foreman, knew or should have known that Petitioner was taking medication which caused drowsiness and decreased his alertness. Telling him to report for work under these conditions, especially in violation of Rule N of the railroad's own safety rules, makes this case "extra" ordinary. It is not beyond anticipation that upon being directed to report to

Knoxville, Petitioner would drive to work over a road which the railroad knew or should have known was heavily traveled in the morning hours; and it is not beyond anticipation that he would become involved in an accident due to his drugged condition. These are events which are a foreseeable consequence of the initial alleged negligence of the railroad on October 20, 1980.

In *Parker v. Long Island Railroad Company,* 425 F.2d 1013 (2nd Cir. 1970), the Seventh Circuit Court of Appeals held that the facts surrounding the employee's commuting to work were not "ordinary" and thus made a submissible case on the issue of scope of employment. In *Parker,* the plaintiff was a track maintenance crew foreman. At the completion of his employment, the employee left the premises of the railroad. He then walked approximately 2000 feet on a public street on or along the railroad right of way to a passenger station maintained by the defendant. He entered the station to catch a train home and was injured in a fall on a station stairway because of inadequate lighting. The railroad provided a pass for use on passenger trains in connection with the employee's track maintenance work and also to commute to and from his home. The trial court held that the question of employment at the time of the injury was for the jury. The Seventh Circuit affirmed, stating that:

> "Ordinarily travel to and from work is not within the time of employment under this Act. ...
>
> We cannot say that a trier could not with reason conclude that the travel was so essential to the master's work as to be considered within the course of employment." 425 F.2d 1013 at 1015.

The court of appeals below acknowledged that *Parker* was an exception to the general rule on the grounds that "it was not economically feasible for the plaintiff to continue the employment if he were not furnished the free railroad travel" since he sometimes remained on call for emergencies. If "economic

feasibility can make a submissible case, then so should "safety contest incentive" or "medical foreseeability."

In summary, Petitioner contends that the decisions below are contrary to the principles implicit in prior decisions of this court and the other Courts of Appeal in reference to the standard of review for passing on the sufficiency of evidence necessary to preclude the granting of summary judgment in the issue of scope of employment under the Federal Employer's Liability Act. Petitioner contends that he raised a genuine doubt as to the material facts of foreseeability and further injury, imputation of negligence of the railroad physician to his employer, and whether the unique circumstances surrounding his subsequent injury while travelling to work take his case outside the general rule.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March, 1985

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-83-531

Bennett Edward Baker

v.

Seaboard System Railroad, Inc.

MEMORANDUM

(Filed Feb. 8, 1984)

This is an action under the Federal Employer's Liability Act [FELA], 45 U.S.C. § 51, *et seq.*, for injuries sustained by plaintiff on October 20, 1980, and October 31, 1980. This case is before the Court on defendant's motion for partial summary judgment.

Defendant says that plaintiff was not acting in the scope of his employment when he was injured in an automobile accident while driving to work and, therefore, that plaintiff may not recover for those injuries under the FELA. Plaintiff says whether the injury he received while driving to work was within the scope of his employment is a question of fact for the jury.

The facts are undisputed. On October 31, 1980, plaintiff left home around 7:00 a.m. to report to work. He drove to work in his own car via Alcoa Highway. The method of transportation, route taken, and arrival time were at his discretion. He was neither paid transportation expenses nor compensation for time while en route to the worksite. He testified in deposition that he was not doing any work for the railroad while he was driving to work.

Under the FELA, defendant railroad is liable in damages "to any person suffering injury while he is employed by such carrier

in . . . commerce." 45 U.S.C. § 51. Injuries received while traveling to and from work generally are not compensable under the FELA because not incurred within the scope of employment. *See, e.g., Getty v. Boston and Maine Corp.*, 505 F.2d 1226 (1st Cir. 1974); *Kress v. Long Island Rail Road*, 526 F. Supp. 856 (S.D. NY 1981); *Spoonamore v. Louisville and Nashville Railroad Co.*, 179 F. Supp. 290 (E.D. KY 1959). However, where the employer has provided the means of transportation, compensated the employee for time spent en route, or otherwise provided control or direction to the employee, travel to the worksite may be within the scope of employment. *See, e.g., Kooker v. Pittsburgh & Lake Erie Railroad Co.*, 258 F.2d 876 (6th Cir. 1958) (It was idle to contend that plaintiff was not injured within the scope of employment while traversing a path to and from the worksite in view of the fact that travel time was compensated.); *Young v. New York, N.H. & H.R. Co.*, 74 F.2d 251 (2nd Cir. 1934) (Generally an employee is not engaged in his occupation when commuting from work except when he is in a vehicle provided by his employer or when he has not yet left the premises.)

In this case, from the undisputed facts, there is no basis upon which a jury could find that plaintiff was acting within the scope of employment while he was traveling to work. Therefore, the motion of defendant for partial summary judgment is sustained.

The Court, however, cautions counsel for the defendant that, generally, a question regarding the scope of employment is a question of fact and should not be addressed in a motion for summary judgment.

Order Accordingly.

/s/ Robert L. Taylor
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-83-531

Bennett Edward Baker

v.

Seaboard System Railroad, Inc.

ORDER

(Filed Feb. 8, 1984)

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that defendant's motion for partial summary judgment, although untimely, be, and the same hereby is, sustained.

ENTER:

/s/ Robert L. Taylor
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-83-531

Bennett Edward Baker

v.

Seaboard System Railroad, Inc.

ORDER

(Filed March 2, 1984)

Plaintiff moves pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for certification to appeal this Court's order granting partial summary judgment for defendant. Plaintiff also moves for a stay of the remaining claim.

With respect to the claim determined by partial summary judgment pursuant to the order filed by this Court on February 8, 1984, it is CERTIFIED in accordance with Rule 54(b), Federal Rules of Civil Procedure:

(1) That the Court has directed the entry of final judgment on the matter for partial summary judgment and

(2) That the Court has determined there is no just reason for delay.

Plaintiff's motion for certification to appeal be, and the same hereby is, granted; and his motion for a stay of the remaining claim be, and the same hereby is, denied.

ENTER:

/s/ Robert L. Taylor
United States District Judge

APPENDIX D

No. 84-5231

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Bennett E. Baker,
Plaintiff-Appellant,

v.

Seaboard System Railroad,
Incorporated.
Defendant-Appellee.

On Appeal From The United States District Court For The Eastern District Of Tennessee, Northern Division

---

Decided and filed Dec. 13, 1984

Before: **ENGEL** and **WELLFORD**, Circuit Judges; and **WEICK**, Senior Circuit Judge.

PER CURIAM. This is a suit brought under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, for injuries sustained by plaintiff on October 31, 1980, while he was driving his car to work. A partial summary judgment motion was granted in favor of the defendant railroad by the trial judge, from which this appeal has been taken.

Appellant Baker is a former employee of the appellee Seaboard System Railroad, Inc., (Seaboard). He worked as a welder, and on October 20, 1980, he suffered a minor back injury while performing his welding work with Seaboard. Baker

received treatment by the company doctor as a consequence. On October 31, 1980, while under pain medication prescribed by the doctor, appellant experienced a serious accident, which rendered him a paraplegic, while driving his own car to a worksite for assigned light duty work. Baker sued Seaboard not only under FELA but also for negligence claiming that the railroad should be liable for actions of the doctor and for assigning him work while under medication.

The Seaboard foreman who assigned the appellant light work at a job site after his back injury purportedly was unaware of, or disregarded, the doctor report which prescribed one week's rest for Baker because of pain and drowsiness. Baker was not reimbursed while commuting to the assigned job site, and Seaboard did not direct him to drive his own car, or any other particular mode of transportation.

At the trial court level the appellee company moved for summary judgment with respect to the FELA claim relating to the automobile accident on October 30, 1980. The trial court granted this partial summary judgment motion, and the parties then dismissed without prejudice by agreement the other injury claim based on negligence relating to the October 20, 1980 episode. Thus, the granting of the summary judgment was a final order and there remain no other pending claims in the district court.

We must decide whether the district court was correct in holding that the appellant's activity was outside the coverage of FELA when commuting to an assigned worksite in his own car.

The question of scope of employment is one of fact and is usually left to the jury. In granting summary judgment for the railroad in this case, however, the district court interpreted a long line of case law precedent holding that an injury sustained by an employee while driving to and from work in his own car does not come under the scope of the FELA.

Section 1 of FELA, 45 U.S.C. § 57 (1939), provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

The purpose of this section is "to enlarge the remedy of railroad employees injured as a result of the hazards incident to their work ..." *Metropolitan Coal Co. v. Johnson,* 265 F.2d 173, 178 (1st Cir. 1959).

While employee coverage under FELA is not strickly limited to those instances when an employee is actually on the job, *see e.g., Morris v. Pennsylvania R. Co.,* 187 F.2d 837 (2nd Cir. 1951), numerous cases have refused to extend FELA coverage to employees who sustain injuries en route to or from work. *See Kress v. Long Island Railroad,* 526 F. Supp. 856 (S.D.N.Y. 1981); *Getty v. Boston and Marine Corp.,* 505 F.2d 1226 (1st Cir. 1974); *Metropolitan Coal Co. v. Johnson, supra; Quirk v. New York & St. L. R.R.,* 189 F.2d 97 (7th Cir.), *cert. denied,* 342 U.S. 871 (1951); *Sassaman v. Pennsylvania R.R. Co.,* 144 F.2d 950 (3d Cir. 1944). The district court's opinion cited *A. G.*

Spoonamore v. Louisville and Nashville Railroad Company, 179 F. Supp. 290 (1959), Civ. 3-83-51 at 3 (E.D. Tenn. Feb. 8, 1984), whose operative facts are similar to those of the instant case. In *Spoonamore,* a railroad employee suffered injury while traveling on a 150 mile journey in a private car to his new job assignment. In dismissing the plaintiff's claim, the *Spoonamore* court stated:

> To extend the coverage of the Federal Employers' Liability Act to plaintiff who at the time of his injury was merely proceeding on his way to his place of work by means of transportation which he voluntarily selected would seem to go far beyond any test "laid down in any of the decided cases which have come to our attention." *Metropolitan Coal Co. v. Johnson,* 1 Cir., 265 F.2d 173, 178; *Sassaman v. Pennsylvania R. Co.,* 3 Cir., 144 F.2d 950.

Id. at 292.

One court has recognized an exception to this rule where the employee travels via means of transportation afforded by the railroad which were usually taken more out of necessity than voluntary choice. *Parker v. Long Island R.R.,* 425 F.2d 1013 (1970). In *Parker* an employee was injured while using a free pass supplied by the railroad for travel on its own transportation lines. This employee usually remained on call for emergencies and the court held that "it was not economically feasible for him to continue the employment if he were not furnished the free railroad travel." 425 F.2d at 1015 (1970). Even this exception engendered a strong dissent by Judge Friendly, 425 F.2d at 1015-1017.

Another exception to the general rule mentioned is the situation where the mode of travel is determined by "employer compulsion." This exception was recognized in *Sassaman, supra,* 144 F.2d at 953 and *Getty, supra,* 505 F.2d at 1228. Neither case, however, found the facts of that respective case to warrant

application of such an exception. (In *Sassaman* an employee was injured while descending from employer's passenger train which he chose to get home; in *Getty* the employee rode the train due to heavy snow but the court still found controlling the degree of employee choice involved in the means of travel.)

The appellant here, Baker, does not even attempt to frame the instant case as fitting into any such exception. Instead, he relies on cases wherein the plaintiff under the particular facts was deemed to be within the scope of employment because he suffered injuries while on duty, on temporary break, or on the premises or property of the employer at work. These cases relied upon by appellant are inapposite here.

The question here is whether the employer is liable for a tortious injury to the employee specifically under the terms and scope of the FELA. The question of Seaboard's common-law negligence is not at issue before us.

We conclude that the district court was correct in holding that the tragic accident occurred outside the coverage of FELA as a matter of settled law. The factual context fits the general rule that an employee who selects his own means of transportation is not within the coverage of FELA in traveling to and from work. The judgment is accordingly affirmed.

APPENDIX E

Leonard L. Naeger, Ph.D.
Pharmacologist

318 Providence Road
Ballwin, Missouri 63011
314-527-6223

December 5th, 1983

Mr. William W. Schooley
Attorney at Law
P.O. Box 1289
Granite City, Illinois

Dear Mr. Schooley:

I am writing in reply to your questions concerning the effects of Soma 350mg and Tylenol # 4 tablets. Each agent alone is capable of producing central nervous system depression, including drowsiness, dizziness, vertigo, and ataxia. Each drug monograph indicates that these symptoms may be increased in patients who receive other drugs with similar side-effects.

Please let me know if you have any further questions.

Sincerely,

/s/ Leonard L. Naeger, Ph.D.
Pharmacologist

APPENDIX F

LOUISVILLE & NASHVILLE RAILROAD COMPANY

908 W. Broadway Louisville, Kentucky 40201

February 9, 1980

Dear Fellow Employees:

This is an appeal to each one of you. We are beginning a new year. We want it to be a SAFE and happy new year for each of you. It cannot be a happy year unless it is a SAFE year for you.

I can pledge to you that we will vigorously continue our efforts toward making this property a safer environment in which to work. Our safety education program produced some good results in 1979, and we will intensify our efforts in this area. We are interested in your safety.

Certainly nothing can succeed without the full cooperation and all-out effort of each one of you. We need you, on the job, knowledgeable in how to perform your duties safely and in accordance with the rules, alert to the dangers that you may be exposed to in performing those duties, with your personal safety and the safety of your fellow employees always in mind.

Again, I appeal to each one of you, please do your part to make 1980 safe for you and your fellow employees and to make the Louisville & Nashville Railroad "No. 1" in this new year.

Sincerely,

K. C. Dufford
Vice President-Operations

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Superintendent
Louisville Division

Louisville, Ky.
February 11, 1980

CIRCULAR NOTICE NO. 35

ALL CONCERNED - MN, ML, LL, CT

It is my pleasure to outline our President's Safety Contest for the Family Lines System for the year 1980, referred to as "Operation SCORE" (Safety Concerns Our Railroad Employees), as announced by Mr. A. Paul Funkhouser:

Introduction

In order to improve employee safety and create greater safety awareness during 1980, a contest will be conducted with primary emphasis on competition betweens operating divisions on the Family Lines. The tangible awards to the winning divisions will be sufficiently large to create a strong incentive among employees to win the contest.

Theme

The contest will be called the President's Safety Contest, and the theme will be "Safety Concerns our Railroad Employees", or Operation SCORE. This will naturally lead to slogans, such as "Let's get on the team. . ." for the kickoff of the contest. A caricature will be developed depicting an employee shooting a basket, sinking a putt, scoring a touchdown, and various other ways in which it is possible to score.

The Program

Operating divisions on the Family Lines System will be divided into two categories, with 3.5 million man hours per year being the dividing line. The division in each category with the best safety record for the year 1980 based on the frequency/severity index will be awarded $25,000.

In addition, the division in either category with the most improved safety record for 1980 (along with other considerations, such as improved programs, etc.) will be awarded $25,000. The improvement will be measured against the average safety record for 1978 and 1979; however, the divisions with the best frequency/severity index in Category I and II will not be eligible for the most improved award.

For the purpose of this contest, the divisions will be as follows:

Group A - 3,500,000 Man Hours or More:

Unit:

Waycross Divn/Waycross Term/Waycross Shops
Tampa/Tampa Shop
Louisville Division
Corbin Division
Atlanta/Atlanta Term (SCL)
Mobile Division
Raleigh Divn/Hamlet Terminal
Jacksonville Division
Louisville Term & South Louisville Shops

Group B - Less than 3,500,000 Man Hours Annually:

Rocky Mount Division
Nashville Division
Savannah Division
Evansville Division
Florence Division
Birmingham Division
Jacksonville Term/Jax Hvy Repr Shops
Atlanta Division (L&N)
Clinchfield RR
Georgia-West Point Route

The establishment of nineteen (19) units is for competitive purposes only. It is not intended that divisional/ter-

minal/work group, etc. identity be diminished, nor that existing jurisdictional boundaries be affected.

General support groups (system gangs) (C&O, Engr/MofW, Stores, etc.) not assigned to divisional units, will also be appropriately recognized for superior safety performances.

The prize money can be spent *for any purpose which the division safety committee wishes to spend it.* This may include a dinner dance for all employees, or a picnic, or jackets and caps for all employees, or any other purpose.

Promotion

The contest will be promoted in the following ways:

A letter from Mr. Mervine to all General Chairmen.

A letter from Mr. Funkhouser announcing Operation SCORE was included with the January paycheck of all employees involved in the contest.

The Employee News Service mid-week report will have an announcement of the contest and will run further items periodically to help stimulate competition.

Posters utilizing the caricature scoring in various ways will be placed on bulletin boards over the entire system each month.

The Family Lines Magazine will run major feature stories concerning Operation SCORE.

Tabulations showing the relative standings of each division will be placed on bulletin boards each month to stimulate interest.

Buttons imprinted, "I'm on the Team" will be furnished to all employees involved.

Shirt pocket protectors with an appropriate slogan will be distributed to all employees.

Recognition Of Winners

The President of the Company will personally present an appropriate trophy to each winning division, along with the prize money with as many employees present as practicable.

The events for which the funds are expended will be publicized widely in the Family Lines Magazine in an effort to create a desire for other divisions to win the contest in future years.

Your efforts in safety over the last 24 month period have accomplished a First Place finish in the Safety Contest on L&N for the year 1978, with the tabulation still not complete for the year 1979, but showing an improvement in the performance of the Louisville Division over the year 1978 and a general improvement on the L&N system, compared to 1978. Our potential on the Louisville Division with the momentum you have already generated and with the safety consciousness and efforts of every employee working on this division and with this new program, is unlimited. Each of us can play a major part in the preventing of accidents and personal injuries and the ultimate goal can be achieved with a 100% combined effort of every employee of the Louisville Division.

To make Operation SCORE a reality on this division, each employee must have a safety first attitude.

C. D. Mosley
Superintendent

MN 24
ML 26
LL 26
CT 22

CWA/cc

cc: CWA, RJB, WLE, CTB, CWL, RTM, VDC, RWB, TLW, DAR, LCF, RNC, JH, GFV,
Mr. H. L. Endicott, FILE

APPENDIX G

LOUISVILLE & NASHVILLE RAILROAD COMPANY

SURGEON'S INITIAL REPORT

West Knoxville STATION *October 20, 1980*

1. NAME *B. E. Baker* AGE *32* SEX *M*
2. NATIONALITY _____ COLOR *W*
   MARRIED OR SINGLE *Married*
3. RESIDENCE *Rt. I, Box 6, Greenback, Tenn.*
   OCCUPATION *Railroad helper*
4. EMPLOYEE, PASSENGER, OR NEITHER *Employee*
5. DATE AND PLACE OF ACCIDENT *October 20, 1980*
   West Knox Yards
6. WHERE AND WHEN FIRST SEEN *Office 10/20/80*
7. NAMES AND ADDRESSES OF THOSE WHO SAW OR KNOW PARTICULARS CONCERNING ACCIDENT
   Mr. R. D. Clairborne
8. DISPOSITION MADE OF INJURED PERSON _____
9. CAUSE OF INJURY—STATE WHAT INJURED PERSON SAID AS TO HOW THE ACCIDENT OCCURRED, USING HIS LANGUAGE AS NEAR AS POSSIBLE *Was picking up welding pot & was sitting pot off & stepped down kindly in a twist causing back to twist.*
10. STATE PROBABLE LENGTH OF TIME THAT INJURED PERSON WILL BE INCAPACITATED FOR HIS USUAL OCCUPATION. IN CASE OF FATAL INJURY STATE

WHETHER DEATH RESULTED WITHIN 24 HOURS AFTER INJURY WAS RECEIVED _____

11. LOCATION AND FULL DESCRIPTION OF THE INJURY (INDICATE ON DIAGRAM) *Lumbar strain - pain left lumbar area-no spasm. Positive straight leg on Rt. Reflexes hyperactive. No sensory change.*

12. FULL DESCRIPTION OF OPERATION AND TREATMENT *Limited flexion of spine. RX Soma Compound 350 mg. QID Tylenol #4.* Heat & Rest. Return 1 week.

13. GIVE NAME AND ADDRESS OF ANY OTHER SURGEON WHO ATTENDED INJURED PERSON _____

14. I WAS REQUESTED BY _____ TO ATTEND THIS CASE

Dr. Tea Acuff
SURGEON

The attending surgeon will note above, fully and explicitly, and at his first visit, the statement made to him by the person injured in regard to accident.

Mark location of injury on diagram on reverse side.

Local surgeons should make this report promptly and forward to the district surgeon. All cases treated by district surgeons should be reported on this form to the general claim agent and to the superintendent. District surgeons should also send to the general claim agent and superintendent copies of all reports received from local surgeons.

BEST AVAILABLE COPY

3/16/72 Skin graft [illegible] of wrist.
[illegible] organizing tendon graft [illegible] and
[illegible] confined area. [illegible]
[illegible] [illegible] [illegible] TLW

4/6/76 Incarceration of [illegible] claw & hand.
Ref [illegible] for [illegible] removal.

4/12/76 - Sutures out - skin in fair condition & healed
- Keep elastic & Reduce thick
GN.

4-15-76 Incision & Drain
for infection healed.
GN.

10/27/80 Back to better. Can feel a little but limited.
Straight leg raising still positive on right.
Ref 2 wks.
TW

APPENDIX H

LOUISVILLE & NASHVILLE RAILROAD CO.

Maintenance Of Way Department

SAFETY RULES

* * * * *

(Pages 8 - 9)

F. Whenever you or the equipment you operate are involved in any accident that results in personal injury or damage to property, regardless of how minor, you must immediately report it to your foreman or supervisor. Get first aid promptly. When medical treatment, emergency or otherwise, is required after leaving company property, prompt report by telephone, personal appearance, or other means of communication must be made to the employee's supervisor.

G. Wrestling, fighting, scuffling, throwing of objects, practical joking, or other activities generally designated as "horse play" are prohibited.

H. Any unsafe condition noted must be corrected immediately if it is possible to do so. If it is something that cannot be easily corrected, it must be reported to the proper official at once.

I. Long hair and beards are a hazard, particularly around moving machinery and where welding and burning operations are being performed, and must not be worn. Hair must be cut in a manner that will not interfere with sight.

J. Employees must be suitably clothed, and in a manner that will not interfere with vision, hearing, or free use of hands or feet in order to perform their duties safely. Shirts must

be worn at all times while on duty. Shorts, loose baggy clothing, flapping coats, wet or worn gloves and too stiff or badly worn shoes are dangerous and must not be worn. Overshoes must be fully buckled. Employees are required to wear suitable footwear, which provides ankle support and with soles thick enough to give good traction and to withstand punctures from sharp object. Employees are urged to wear safety shoes with steel protected toes and non-slip soles. Shoe laces must be properly laced and tied. Tennis shoes, sandals or strollers must not be worn while on duty. Employees must wear shoes with medium or low heels and substantial soles.

K. A large proportion of injuries are the result of falling, slipping, tripping, etc. These injuries occur at all times and under all circumstances. Therefore, employees must watch their step at all times.

L. The use of sun glasses by employees required to observe color signals is prohibited unless they are prescribed by an oculist or ophthalmologist.

M. Contact lenses are not in themselves protective devices and, in fact, may increase the degree of injury to the eyes. The same eye-protective devices used by other workers must be worn by contact lens wearers in similar employment.

N. The use within the eight-hour period before reporting for duty, or while on duty, of any medicines or drugs which produces drowsiness or reduce mental alertness is prohibited.

O. Employees shall keep the premises subject to his control in a clean and orderly condition. Material will be picked up at conclusion of each work assignment and in no case will it be left where it could cause a safety hazard. Good housekeeping is essential to safety.

P. When on company property going to or from work, or about their work, employees must use designated safe paths and walkways. Jumping over pits and such other hazardous acts are prohibited.

Q. When working at night, exercise utmost care to avoid the hazards caused by shadows resulting from the use of lights.

R. Running at any time while on company property, except in case of emergency, is prohibited.

Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BENNETT EDWARD BAKER,
Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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P. O. Box 1708
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615/637-5600
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Where a railroad employee was injured in an automobile accident which occurred while he was commuting to work from his home in his own automobile on a public highway, and, admittedly, it was up to him to choose the means and route by which he commuted, he was traveling on his own time and at his own expense, and he was not performing any work for the railroad—was the employee injured "while he (was) employed" by the railroad in "commerce", i.e., acting within the scope of his railroad employment, so that he could maintain an action against the railroad for the injury under the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq.?

Both the lower Courts (United States District Court for the Eastern District of Tennessee, Northern Division, and the United States Court of Appeals for the Sixth Circuit) have answered the question, "No".

Respondent* (the railroad) respectfully submits that the lower Courts were manifestly correct in so answering the question and that the petition for a writ of certiorari should be denied.

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* Respondent, Seaboard System Railroad, Inc., is a subsidiary of CSX Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1451

BENNETT EDWARD BAKER,
Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In this action, petitioner (Mr. Baker) sought to recover from the railroad under the provisions of the Federal Employers' Liability Act for injuries which he received on two different occasions. The first injury, a relatively minor back injury, occurred on October 20, 1980, while he was at work and was helping to lift a welding pot. The second injury, a very serious

one which left Mr. Baker a paraplegic, occurred on October 31, 1980, when he was in an automobile accident while commuting to work.

After taking Mr. Baker's discovery deposition, the railroad moved for the entry of a partial summary judgment in its favor, dismissing that portion of the action in which Mr. Baker sought to recover under the Act for the injury which occurred on October 31, 1980, when Mr. Baker had his automobile accident while commuting to work. The deposition and a brief were filed in support of the motion.

In opposition to the motion, Mr. Baker filed a brief, the depositions of Mrs. Baker and Mr. Reese, a railroad employee, and the affidavits of a Mr. Naeger and a Mr. Lyng.

In a well reasoned opinion, the District Judge, after citing numerous cases, held that under the undisputed facts Mr. Baker was not acting within the scope of his employment when he was injured in the automobile accident on October 31, 1980, while commuting to work, and that Mr. Baker was accordingly not entitled to maintain an action under the Act for that injury. An order sustaining the motion and dismissing the action insofar as it sought a recovery under the Act for the injury of October 31, 1980, was then entered. On Mr. Baker's motion, and without objection from the railroad, the District Judge then certified the order to be a final one under the provisions of Rule 54(b), FRCP, so that Mr. Baker might appeal the order. (The parties then stipulated a dismissal without prejudice of the remaining portion of the action which related to the injury which Mr. Baker received while he was at work on October 20, 1980.)

Mr. Baker appealed the order to the United States Court of Appeals for the Sixth Circuit, and that Court, after considering the briefs and hearing oral argument, issued an opinion which cited and followed the well-established law and affirmed the order.

ARGUMENT

A.

The Situation

The railroad submits that the situation is this: (1) The Federal Employers' Liability Act provides at 45 U.S.C. § 51 that an action may be maintained thereunder only if *two* things have happened. The first is that a railroad employee has sustained an injury while he was employed by the railroad in "commerce", i.e., while he was acting within the scope of his railroad employment. The second is that the injury which was so sustained within the scope of employment resulted in whole or in part from negligence of the railroad. (2) Here, by his own admissions under oath Mr. Baker established beyond any question that his automobile accident injury of October 31, 1980, was *not* sustained while he was employed by the railroad in "commerce", i.e., while he was acting within the scope of his railroad employment. (3) Nevertheless, and although he could have brought a common law action against the railroad if he chose to contend that the automobile accident injury was somehow caused by negligence on the part of the railroad rather than by his own negligence, he did not file such an action. (4) Instead, he sought to maintain an action under the Act for the automobile accident

injury primarily, if not solely, on the theory that it was somehow the fault of the railroad. (5) It would appear that Mr. Baker's principal argument in his petition (as it was in the two lower Courts which correctly rejected it) is that the motion for partial summary judgment should not have been granted, because there may have been some fact issues with respect to his contention that negligence on the part of the railroad, rather than his own negligence, may have caused his automobile accident injury. In short, Mr. Baker contends, in effect, as he did in the two lower Courts, that we should essentially ignore the requirement of the Act that for an injury to be actionable thereunder the injury must occur while the employee is acting within the scope of his railroad employment, and permit him to maintain an action under the Act for the injury, because, he says, the injury may somehow have resulted from negligence on the part of the railroad. Mr. Baker is simply continuing to burden the Courts with an ill-conceived attempt to maintain an action under the Act when his remedy was at common law.

B.

The Facts About Which There Is Admittedly No Genuine Issue

As is conceded at page 7 of the petition, with respect to his automobile accident of October 31, 1980, Mr. Baker made the following admissions in his discovery deposition which was taken on December 8, 1983:

1. He was driving his own automobile from his home en route to work.

2. He was driving on Alcoa Highway, which is a four-lane public highway.

3. The railroad didn't tell him how to get to work. It was his choice to drive his automobile rather than to take some other means of transportation, and it was his choice to take the route that he did.

4. On this occasion, as on all others when he was traveling to work, he was not paid for his time and he was traveling at his own expense.

5. He wasn't doing any work for the railroad when he was driving to work.

C.

The Law

The pertinent provision of the Federal Employers' Liability Act appears in the following emphasized portion of 45 U.S.C. § 51:

> "*Every common carrier by railroad while engaging in commerce* between any of the several States or Territories * * * *shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce* * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

> employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Emphasis supplied)

As the elementary proposition was stated in *Metropolitan Coal Company* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959),

> "(T)he obvious purpose of the Federal Employers' Liability Act is to enlarge the remedy of railroad employees injured as a result of hazards incident to their work." 265 F.2d at 178.

That a railroad employee who is commuting to work on his own time, at his own expense and by means of his own choice is not engaged in "commerce", i.e., acting within the scope of his railroad employment, and may not bring an action under the Federal Employers' Liability Act for an injury which he receives while he is so commuting, is so well established that the Court will not need citations. But, by way of illustration, the following cases may be noted: *Sassaman* v. *Pennsylvania R. Co.,* 144 F.2d 950 (3rd Cir. 1944). (Train dispatcher, injured while alighting from employer's passenger train on which he was returning home from work, could not maintain action under the Act.); *Quirk* v. *New York, C. & St. L. R. Co.,* 189 F.2d 97 (7th Cir. 1951, cert. denied 342 U.S. 871). (Track maintenance foreman, who at end of day's work traveled by private automobile to his headquarters and was injured while he was thereafter using railroad motorcar in continuing trip to his home, could not maintain action under the Act.); *Metropolitan Coal Co.* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959). (Flagman, injured while riding on pass on railroad's passenger train to reach freight train on which he was

to begin work, could not maintain action under the Act.); *Getty* v. *Boston And Maine Corporation,* 505 F.2d 1226 (1st Cir. 1974). (Carman, injured in fall while walking toward train station platform to board passenger train to travel to his work place, could not maintain action under the Act.); *Kress* v. *Long Island R. R.,* 526 F. Supp. 856 (S.D. N.Y. 1981). (Freight clerk, assaulted in railroad's parking lot to which she had traveled 25 miles from place of work on railroad pass, could not maintain action under the Act.); and *Spoonamore* v. *Louisville and Nashville Railroad Company,* 179 F. Supp. 290 (E.D. Ky. 1959). (Locomotive engineer, injured when private automobile in which he was a passenger was involved in accident en route from his home to report for work on train, could not maintain action under the Act.)

The "commuting to work" cases on which Mr. Baker relies are inapposite. (Both were noted and distinguished from this case by the United States Court of Appeals for the Sixth Circuit in its opinion.) Thus, in *Parker* v. *Long Island Railroad,* 425 F.2d 1013 (2nd Cir. 1970), the employee after completing his work at a railroad tower walked to the railroad's passenger station where he was going to use a pass, which the railroad provided, to ride a train to his home 40 miles distant. He fell in the station due to poor lighting. Not only did the injury occur on railroad premises, but it appeared that the employee had no reasonable alternative but to use the pass in going home, and the employee was expected to use the pass in response to a railroad emergency. (Although *Parker* is clearly distinguishable from the case here, it appears to be a questionable holding, and there was a strong dissent by Judge Friendly.) And in *Getty* v. *Boston And*

Maine Corporation, 505 F.2d 1226 (1st Cir. 1974), which we have hereinbefore cited and shown to have held, along with numerous other cases, that a railroad employee who is commuting to or from work by means of his own choice is not acting within the scope of his railroad employment, the court by way of dictum made a statement on which Mr. Baker seeks to rely. The reliance is completely misplaced. The dictum was that "the situation may change if getting to work requires the employee to face unique hazards". (505 F.2d at 1228) The citation for the dictum was *Metropolitan Coal Co.* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959), another case which we have hereinbefore cited and shown to have held, along with numerous other cases, that a railroad employee who is commuting to or from work by means of his own choice is not acting within the scope of his railroad employment. In *Metropolitan,* the court simply noted, as we have hereinbefore quoted from its opinion, that the obvious purpose of the Act is to enlarge the remedy of railroad employees who are injured as a result of hazards incident to their work, and the court held that for an employee to be exposed to any of those hazards he would have to be at work or on a part of the railroad's premises, or perhaps adjacent premises, which it was necessary for him to use to reach his work.

D.

Discussion

Mr. Baker states in his petition that the holdings of the lower Courts in this case "are in conflict with applicable decisions of this Court as well as other Courts of Appeal in construing the Statute". And yet

Mr. Baker does not cite any decision of this Court or any decision of any other Court in an effort to support that statement. The reason for his failure to do so is, of course, a very simple one—he can't, and the fact is that the holdings below are, as we have seen, fully in accord with well established law.

Mr. Baker seems to address a substantial portion, if not most, of his petition to his contention that his automobile accident injury may have been caused by negligence on the part of the railroad rather than by his own negligence. The same situation existed in each of the commuting to work cases which we have cited, i.e., even though it was alleged that the injury was caused by railroad negligence, an action therefor could not be maintained under the Act, because the injury was not sustained while the employee was acting within the scope of his railroad employment. In short, in each of those cases, as here, the action lacked one of the two essential requirements under the Act.

It is interesting to note that in each of the Federal Employers' Liability Act cases which Mr. Baker cites on the subject of railroad negligence, including foreseeability and legal consequence, the injury of which complaint was made occurred while the employee was acting within the scope of his railroad employment. Thus, in *O'Donnell* v. *Pennsylvania R. Co.*, 122 F. Supp. 899 (S.D. N.Y. 1954), the employee, an engineman, got a foreign body in his eye while he was at work. A railroad doctor treated the eye, and as a result the eye injury allegedly worsened. And in *Dunn* v. *Conemaugh & Black Lick Railroad*, 267 F.2d 571 (3rd Cir. 1959) (162 F. Supp. 324 below; cited by Mr. Baker as 163 F. Supp. 324), the employee had surgery

for chronic ulcers and was certified for return to work by a railroad doctor. Thereafter, and while he was engaged in heavy work, he suffered a large ventral hernia, for which he sued. And in *Panichella* v. *Pennsylvania Railroad Company (*v. *Warner Brothers Pictures, Inc.),* 167 F. Supp. 345 (W.D. Pa. 1958), the employee was at work and was being paid for his time when at the direction of his foreman he went upon a snow covered sidewalk adjacent to the premises of a third party and slipped and fell. And, finally, in *Waller* v. *Southern Pacific Company,* 57 Cal. Rptr. 353, 424 P.2d 937 (Sup. Ct. Cal. 1967), the employee, a train dispatcher with a history of coronary artery disease, was certified by railroad doctors as being fit for work after a hospitalization, and upon returning to work and as a consequence of the stress of his job he suffered an aggravation of his heart condition for which he sued.

A final word. Mr. Baker suggests in his petition that his reporting for work was of benefit to the railroad because of a "safety contest". Although his so reporting was undoubtedly of as much benefit to him as it was to the railroad, he then suggests something which seemingly demonstrates a realization on his part that the lower Courts were entirely correct in their holdings. And the suggestion is a startling one and obviously incorrect. The suggestion seems to be that if it was of benefit to the railroad for him to report for work it was also of benefit to the railroad for him to commute to work, and because of that "benefit" he should be permitted to maintain an action under the Act for his automobile accident injury! (A far reaching suggestion, because it is of benefit to the railroad for each of its employees to report for work. As the

saying goes, you can't run a railroad without people.) Mr. Baker's suggestion is, of course, contrary to the clear language of the Act (45 U.S.C. § 51) and all established law. As was stated in *Quirk* v. *New York, C. & St. L. R. Co.,* 189 F.2d 97 (7th Cir. 1951, cert. denied 342 U.S. 871), a commuting to work case which we have cited earlier:

> "We are not unmindful of the liberal interpretation which the courts have placed, and properly so, upon the Federal Employers' Liability Act, designed for the benefit and protection of railroad employees but, even so, there is a point beyond which its application must be denied. Plaintiff's position in the instant case, if accepted, would come close to stripping it of any limitation." 189 F.2d at 101.

CONCLUSION

The petition for a writ of certiorari is patently without merit and should be denied.

Respectfully submitted,

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